SUPREME COURT #SC87205

IN THE SUPREME COURT OF THE STATE OF MISSOURI

DAVID NELSON
Appellant,

v.

DENNIS CRANE, SHERIFF OF CALLAWAY COUNTY,
Respondent.

APPELLANT'S BRIEF

On Appeal from the Circuit Court of Callaway County
The Honorable Ellen Roper, Judge

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JURISDICTIONAL STATEMENT

This appeal is from a Judgment of the Circuit Court of Callaway County, the Hon. Judge Ellen Roper, denying Appellant relief from on his petitioner for review of a Sheriff's denial of an application for a permit to acquire a concealable firearm. In that the appeal contests the validity of two specific statutes, §§571.090.1(6) and 632.305,1 as construed by both the Sheriff of Callaway County and the Trial Court, it involves a category of cases reserved for the exclusive jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction lies in the in this Court. Article V, §3, Missouri Constitution (as amended 1982).

Oral argument is requested.

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1 All citations to statutory references hereafter are to Missouri Revised Statutes' most current compilation.

STATEMENT OF FACTS

On September 11, 2003, Judge Joe Holt signed an order consigning Appellant David Nelson (hereinafter "Nelson) to the custody of the Missouri Department of Mental Health, or the Mid-Missouri Mental Health Center, for a period of 96 hours for evaluation and treatment. Legal File (hereinafter "L.F.") at 17 (Joint Stipulation Exhibit D.). A Petition for Detention, Evaluation and Treatment was filed by a police officer citing statements allegedly made by Nelson that he was going to do harm to himself and that he, Nelson, did not want to live. L.F. at 19. Nelson was not present for the *ex parte* hearing on the petition, nor was he provided prior notice, access to counsel or any form of adversarial hearing. L.F. at 12, 17.

On September 15, 2003, Nelson was released from the Mid-Missouri Mental Health Center without the filing of a subsequent petition for further detention and/or treatment under Chapter 632, RSMo. L.F. at 15, 20. The discharge summary stated that Nelson had no Axis I mental illness, needed no medication and no further follow-up. L.F. 13, 20. Nelson was, and continues to be, an employee of the Missouri Department of Corrections at the Fulton Reception and Diagnostic Center and is qualified to carry firearms in his line of duty. L.F. at 08, 14, 21.

On April 27, 2005, Nelson made application for a permit to acquire a concealable firearm pursuant to §571.090 to the Sheriff of Callaway County,

Missouri, the Hon. Dennis Crane (hereinafter "the Sheriff"). L.F. at 08. On the 28th of April 2005, Darryl Maylee, the Sheriff's designee, denied the application. L.F. at 08.

The denial cited the following single reason for refusing the permit:

> "#6 On 9-11-03 was committed to Mid-Mo Mental Health Facility on 96-hour court order committ. (sic)"

L.F. at 09. The body of the permit application was endorsed with two handwritten notations; "no record" and "two permits." Subsequent to this denial, Nelson filed a proper petition to contest the Sheriff's refusal of his application. L.F. at 07.

The petition for review of the Sheriff's denial of the application for the permit to acquire was initially heard in the Small Claims Court of Callaway County, the Hon. Judge Joe Holt. L.F. at 2, 10. Upon an adverse finding by the Court of Small Claims, Nelson made a timely application for Trial De Novo and the same was heard by the Hon. Judge Ellen Roper. L.F. at 2, 3-4, 10.

The evidence at Trial De Novo was submitted on a joint stipulation of the parties. L.F. at 12-22. The Trial De Novo Court (hereinafter "Trial Court") found; 1) that the term "commitment" as used in §571.090.1(6) has the same meaning as "detention" as used in numerous sections of Chapter 632 regarding the civil commitment of mentally ill persons, and 2) that Nelson's rights to keep and bear arms

and due process rights were not violated and that the permit was properly denied by the Sheriff.

From such judgment of the Callaway County Circuit Court, Nelson makes the instant appeal.

POINTS RELIED ON

I

THE TRIAL COURT ERRED IN DENYING NELSON'S PETITION FOR REVIEW OF THE SHERIFF'S DENIAL OF HIS APPLICATION FOR A PERMIT TO ACQUIRE A CONCEALABLE FIREARM IN THAT THE COMBINED EFFECT OF SECTIONS 632.305 AND 571.090.1(6) VIOLATES NELSON'S, AND ALL OTHER SIMILARLY SITUATED PERSONS, DUE PROCESS RIGHTS UNDER THE UNITED STATES AND MISSOURI CONSTUTIONS BECAUSE NELSON, AND ALL OTHER APPLICANTS, LOSE FOREVER THEIR CONSTITUTIONALLY PROTECTED RIGHT TO ACQUIRE A CONCEALABLE FIREARM WITHOUT EFFECTIVE NOTICE OF THE PROCEEDINGS AGAINST THEM, ACCESS TO COUNSEL TO ASSIST THEM IN THE HEARING AND A CHANCE TO CONTEST THE ISSUANCE OF THE ORDER WHICH ACCOMPLISHES THE DEPRIVATION OF THEIR RIGHTS.

State v. Mullinax, 269 S.W.2d 72 (Mo.banc 1954).

Moore v. Board of Educ.of Fulton Public School No.58, 836 S.W.2d 943 (Mo. 1992).

Mo. Const. Art. I, Section 10.

U.S. Const., Amend. 14

II

THE TRIAL COURT ERRED IN DENYING NELSON'S PETITION FOR REVIEW OF THE SHERIFF'S DENIAL OF HIS APPLICATION FOR A PERMIT TO ACQUIRE A CONCEALABLE FIREARM IN THAT THE TERM "COMMITTED" AS USED IN SECTION 571.090.1(6) IS NOT SYNOUNOUS WITH THE TERM "DETENTION" AS USED IN CHAPTER 632 AS "DETENTION" REFERS TO THE PHYSICAL TAKING INTO CUSTODY OF PERSONS WITHOUT REGARD TO THE PROCESS AFFORDED THE DETAINEE AND "COMMITMENT" REFERS TO THE RESULT AFTER A HEARING ON THE MERITS WITH APPROPRIATE CONSTUTIONAL SAFEGAURDS.

Lane v. Lensmeyer, 158 S.W. 218, 226 (Mo. 2005).

§571.090.1(6)

Chapter 632, RSMo, *et seq.*

ARGUMENTS

POINT I

THE TRIAL COURT ERRED IN DENYING NELSON'S PETITION FOR REVIEW OF THE SHERIFF'S DENIAL OF HIS APPLICATION FOR A PERMIT TO ACQUIRE A CONCEALABLE FIREARM IN THAT THE COMBINED EFFECT OF SECTIONS 632.305 AND 571.090.1(6) VIOLATES NELSON'S, AND ALL OTHER SIMILARLY SITUATED PERSONS, DUE PROCESS RIGHTS UNDER THE UNITED STATES AND MISSOURI CONSTUTIONS BECAUSE NELSON, AND ALL OTHER APPLICANTS, LOSE FOREVER THEIR CONSTITUTIONALLY PROTECTED RIGHT TO ACQUIRE A CONCEALABLE FIREARM WITHOUT EFFECTIVE NOTICE OF THE PROCEEDINGS AGAINST THEM, ACCESS TO COUNSEL TO ASSIST THEM IN THE HEARING AND A CHANCE TO CONTEST THE ISSUANCE OF THE ORDER WHICH ACCOMPLISHES THE DEPRIVATION OF THEIR RIGHTS.

Due Process has as its core a concept of a systematic and fair process that, at its conclusion, provides a safeguard against arbitrary conduct that deprives citizens of important rights under our system of ordered liberty. In short, it is a shield to prevent errors,[2] injustices and the pernicious effects of capricious acts from doing long-term damage to the common citizen. Today, Mr. Nelson is the victim of such an arbitrary action depriving him of his important rights and stands without any hope or chance of remedy, either at the time of the action that caused the deprivation, or by any process today.

His position is not unique. Any person who has been the subject of an *ex parte* order for detention, evaluation and treatment under Missouri's civil detention statute

2 *Addington v. Texas,* 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d. (1978)

without having been afforded due process to contest the issuance of that 96- hour order would be in the same position. Each of these persons is caught in an almost classic "Catch 22;" never again to be trusted by society to be allowed to acquire a concealable firearm, but not crazy enough to justify a proceeding for commitment wherein they might contest their sanity. Even then, once the 96- hour order is signed, no relief is *ever available* to remove the disability caused by issuance of the *ex parte* order.

Before descending into a detailed discussion of Due Process and its application (or lack of application) to this case; it is important to spend a short time considering the relationship between Nelson's Due Process claim and his claim regarding statutory construction (Point II). Appellant asserts in Point II that the Trial Court's construction of §571.090.1(6) and Chapter 632 is incorrect in equating the terms "detention" and "commitment. 3" By making that identity, i.e. that any "detention" under Chapter 632 amounts to being "committed" under §571.090.1(6), a Due Process violation must follow and the combination of §632.305 and §571.090.1(6) will ultimately fail to pass constitutional muster.

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3 The Trial Court incorrectly cited the term "commitment" as being used in §571.090.1(6) when in fact the specific term used is "committed." Whatever form of the word, the argument remains the same.

However, should §571.090.1(6) be construed to only apply to being "committed" as defined as an order entered by a Court of competent jurisdiction after effective notice, opportunity to be heard, access to counsel and right of appeal (as set out in the statutory process of Chapter 632), then Appellant prevails on Point II and needs no relief as to Count I. In that light, Appellant proceeds with his argument with respect to Due Process.

The standard for appellate review in this court tried case is that "[t]he judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law." *Murphy vs. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). In this matter, the Trial Court erroneously declared or applied the law relating to the due process clauses of the Constitution of the United States and the Constitution of the State of Missouri.

Appellant has the Right to Keep and Bear Arms under the United States Constitution, Amendment 2, and the Missouri State Constitution, Article I, Section 23, as Amended .[4] *See Brooks v. State*, 128 S.W.3d 844 (Mo. banc 2004) (Missouri

4. "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons."

citizens have a right under the State Constitution to keep and bear arms); and *see also United States v Verdugo-Urquidez*, 494 U.S. 259 (1990); *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001). Appellant also has a right to due process under both those documents. U.S. Const., Amend. 14 and Mo. Const. Art. I, Section 10.

"The Due Process Clauses require that in order to deprive a person of a[n] . . . interest, he must receive notice and an opportunity for a hearing appropriate to the nature of the case. [citation omitted] Due process contemplates the opportunity to be heard at a meaningful time and in a meaningful manner." *Moore v. Board of Educ.of Fulton Public School No.58*, 836 S.W.2d 943, 947 (Mo. 1992). As to what constitutes notice and an opportunity to be heard, at a meaningful time and in a meaningful manner, is the crux of what process will be afforded under particular circumstances.

Since this matter is intimately bound up in the circumstances surrounding a proceeding under Chapter 632, which synergistically interacted with §571.090.1(6) to do violence to Appellant's rights herein, it is important to consider what process is constitutionally due to persons facing civil commitment for mental illness. It is also important to comment that there is almost no case law precedent in Missouri relating to firearm rights and what process is appropriate in proceedings that affect firearm rights substantially other than as an undifferentiated part of a citizen's bundle of other rights.

It is clear that the police power of the State supports the apprehension and temporary detention of persons who are allegedly insane and who could cause a danger to themselves and/or others for the purpose of investigating the allegations of mental illness. *See State v. Mullinax*, 269 S.W.2d 72, 76 (Mo.banc 1954). However, it is equally clear that due process is a "necessary prerequisite to any judgment of insanity or otherwise which deprived . . . [a] person of either liberty or property." *Id*, 269 S.W.2d at 76. Therefore, due process is required before a determination as to insanity can affect the collateral rights of that person, such to include the fundamental right of firearms acquisition and ownership. This is especially true when our State Constitution specifically asserts that the right to keep and bear arms shall not even be "questioned." Mo. Const. Art I, §23.

Of the bundle of Nelson's rights affected by his detention for evaluation and treatment in 2004, only one was permanently affected: his firearms rights. He was granted his freedom within 96 hours and returned to his life. No loss of any other privileged was occasioned; except for his ability to obtain a permit to acquire a concealable firearm. He has been branded with the "stigma" of mental illness, unfit to be trusted with a concealable firearm, a "stigma" from which he will never be relieved. *See Addington v. Texas*, 441 U.S. at 425-426 ('adverse social consequences" and "stigma" can flow from commitment proceedings); and *Vitek v.*

Jones 445 U.S. 480, 492, 100 S.Ct. 1254, 63 L.Ed.2d. 552 (1979) (*following Addington* and regarding process due upon transfer of prison inmate to mental institution where freedom is not an issue).

What relief can he obtain? He cannot contest his sanity at a hearing under the process available to him under §632.305 because he did not have prior notice of the proceeding such that he could have been present. Further, while §632.305 provides that nothing in the section prevents the court from having the respondent present for a hearing, nothing requires such presence nor is there any requirement for effective notice so such physical presence could have made a meaningful difference. Finally, once the order is signed there was nothing then, nor anything now, which Nelson might have done, or can do now, to recall the "commitment" order signed by Judge Holt. For the rest of Nelson's life, this order of "commitment" will follow him and prevent him from obtaining a permit to acquire a concealable firearm.

Sections 635.305 and 571.090.1(6), as construed by the Sheriff and the Trial Court, have worked a constitutionally impermissible hardship upon Nelson. Whether or not the allegations contained within the affidavit were true or false, whether or not (as in Nelson's case) his evaluation found that he was not mentally ill; Nelson is forever "branded" a crazy person and thereby stripped of his rights as

a citizen. It is if Nelson was found to be insane while remaining sane, and is haunted by a "ghost" finding he can never escape. This is an injustice.

ARGUMENT II

THE TRIAL COURT ERRED IN DENYING NELSON'S PETITION FOR REVIEW OF THE SHERIFF'S DENIAL OF HIS APPLICATION FOR A PERMIT TO ACQUIRE A CONCEALABLE FIREARM IN THAT THE TERM "COMMITTED" AS USED IN SECTION 571.090.1(6) IS NOT SYNOUNOUS WITH THE TERM "DETENTION" AS USED IN CHAPTER 632 AS "DETENTION" REFERS TO THE PHYSICAL TAKING INTO CUSTODY OF PERSONS WITHOUT REGARD TO THE PROCESS AFFORDED THE DETAINEE AND "COMMITMENT" REFERS TO THE RESULT AFTER A HEARING ON THE MERITS WITH APPROPRIATE CONSTUTIONAL SAFEGAURDS.

The Trial Court erred in finding that the term "commitment" as used in §591.090.1(6) is synonymous with the term "detention" as used in Chapter 632, RSMo.. As previously observed, if Appellant is correct in his construction of "committed" as used in Section §571.090.1(6) then his complaint with respect to the lack of Due Process evaporates as the detention order signed by Judge Holt which is the basis of the Sheriff's denial would not be covered by §571.090.1(6). Obviously, to construe §571.090.1(6) such that neither Nelson, nor any other possible applicant for a permit to acquire similarly situated, has a complaint with regard to a Due Process violation would do less violence to either statute than invalidating either outright. This is especially comforting as it also actually appears to the correct construction of the relationship between these two statutes and the terms used.

As with Point I, the standard of review for the claims of trial court error remain the same; that the Trial Court erroneously declared or applied the law. *Murphy vs. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). Specifically, Nelson alleges that the Trial Court error in its construction of Section 571.090.1(6), which states as follows:

> Is not currently adjudged mentally incompetent and has not been *committed* to a mental health facility, as defined in section 632.005, RSMo, or a similar institution located in another state.

Section 571.090.1(6), RSMo. (emphasis added). Nelson was ordered by Judge Holt to be "detained" and not "committed;" therefore the question is -are these two terms intended to be legally identical in meaning?

> In interpreting statutes, this Court determines the intent of the legislature, giving the language used its plain and ordinary meaning. [*citation omitted*] In determining legislative intent, the statute is read as a whole and *in pari materia* with related sections. [*citation omitted*] In interpreting statutes, "'it is appropriate to take into consideration statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed, even though the statutes are found in different chapters and were enacted at different times.'"

Lane v. Lensmeyer, 158 S.W. 218, 226 (Mo. 2005) ((*citing State, Mo. Dep't of Soc. Servs., Div. of Aging v. Brookside Nursing Ctr., Inc.*, 50 S.W.3d 273, 276 (Mo. banc 2001) and *Buck v. Leggett*, 813 S.W.2d 872, 874-75 (Mo. banc 1991) (quoting *Citizens Elec. v. Dir. of Dept. of Rev.*, 766 S.W.2d 450, 452 (Mo. banc 1989))

The term "committed" or "commitment" is not defined directly either in Chapter 632 or Chapter 571 of the Revised Statues of Missouri. "Commitment" is used in Chapter 632 ten times and the term "committed" is used 31 times in various places throughout the chapter. Neither is "detention" defined in Chapter 632 and "detention," "detain" or "detained" are used so many times as to be tedious to count. There are three specific circumstances which illustrate that the Trial Court is incorrect in its determination that "detention" and "commitment" (or actually "committed") are terms of identity as used in Chapter 632; 1) the fact that the legislature used them together in the same sentence in a manner which indicates that the Legislature believes the two terms to refer to different things, 2) the multiple references to commitments or committed persons under other chapters of Missouri law wherein due process has been employed to adjudge a person to be under the control or custody of various legal authorities, and 3) that the involuntary detention and civil commitment statutes uses the term distinctly to describe the status of persons who have be afford due process under Chapter 632.

There are several sections in Chapter 632 that refer to "detention" or "detained" and "commitment" or "committed" in a manner which indicates that the Legislature is intentional referring to two distinctly different states under the law. Section 632.370.1 concerns the transfer of patients to various facilities by the Department of Mental Health for the purposes of providing them necessary treatment. One portion of that statute reads "[t]he head of the mental health program shall notify the court *ordering detention or commitment*, the patient's last known attorney of record and the mental health coordinator for the region, and if the person was committed pursuant to chapter 552, RSMo, to the prosecuting attorney of the jurisdiction where the person was tried and acquitted, of any transfer from one mental health facility to another." §632.370.1, RSMo. (emphasis added). Likewise §632.392 makes a similar differential reference to "committed" or "civilly detained" persons when addressing specific actions the Legislature desired to occur at the release of "committed" or "detained" persons. §632.392.1 RSMo. Section 632.395.1 again makes a similar differentiation between the two legal states as if the two legal states could arise separately out of the proceedings under Chapter 632 ("If an individual ordered to be *involuntarily detained or committed*, *treated and evaluated pursuant to this chapter* is eligible for hospital care or treatment by any agency of the United States, the court, upon receipt of a certificate from such agency showing that facilities are available and that the

individual is eligible for care or treatment therein, may order him to be placed in the custody of such agency for hospitalization.")(emphasis added). §632.395.1 RSMo..

Even looking outside of Chapter 632 reveals that with respect to detentions and commitments under Chapter 632, the Legislature view them as different animals. In §575.195. 1. "[a] person commits the crime of escape from *commitment or detention* if he or she has been committed to a state mental hospital under the provisions of sections 552.010 to 552.080, RSMo, or of sections 632.480 to 632.513, RSMo, or has been ordered to be taken into custody, detained, or held pursuant to sections 632.480 to 632.513, RSMo, and he or she escapes from such commitment or detention." While this section doesn't concern specifically a detention under §632.305, it shows that a detention under another section of the same chapter, that concerning sexual violent predators pursuant to §632.484, while ordered by a judge, is not the same thing as a commitment.

Obviously, the Legislature viewed commitment and detention as separate terms, not ones of identity. This construction is further supported by the manner in which the Legislature used commitment to refer to the legal status created after due process was accomplished. Chapter 632 abounds with references to "commitments" or persons "committed" under other chapters wherein such status is the result of a legal process involving notice, opportunity to be heard and a hearing on the merits. Chapter 632

refers to "commitments" from Chapter 552 (criminal mental competency/responsibility commitment-632.370; 632.445.2(4); 632.483.5; 632.484.1(2) and 632.486), Chapter 211 (juvenile court commitment- 632.115; 632.370; 632.380) and Chapter 475 (guardianship- 632.380). Each of these sections provides for due process in a constitutionally appropriate manner affording serious and significant protection to each citizen who comes under the purview of the appropriate courts involved.

"Commitment" and "committed" are also used within Chapter 632 to refer to the results obtained by and through due process within the Chapter generally and within the civil detention and treatment statutes themselves. Section 632.355 concerns the process by which a person may be placed into the custody of the Department of Mental Health for a period of one year for additional detention and treatment and sets the time frame for the filing of a petition to accomplish that as being " within the ninety-day commitment period" resulting from previous process under the involuntary detention and commitment statutes. *See* §632.355. That person has either had a hearing under §632.350, or waived it, has been "committed" for ninety days because due process has been satisfied. Additionally, in §632.375.2(3), a section concerning a requirement for periodic evaluations for persons detained for a period of one year, the result of the judicial process of §632.355, providing for notice, access to counsel, and

a meaningful hearing at a meaningful time, is referred to as a "commitment order." §632.375.2(3).

Consequently, of the three periods of detention and treatment that require a full panoply of due process rights, those for 21 days, 90 days and one year respective, two of those periods are referred to as "commitments" within Chapter 632 itself. The Chapter also refers to its own internal processes as "commitments" when addressing the result of the process determining "Criminal Sexual Psychopaths" (now repealed) and its replacement status, the Sexual Violent Predator." *See* §632.475 and §§632.480 to 632.513. This "habit" of reference differentiates the two different states, one describing real, actual, physical custody without reference to the prior occurrence of due process and the other describing a legal status resulting from a specific, delineated process under the law which affords the subjects of that process constitutional protection.

Three specific areas of reference within Chapter 632 regard the term "commitment" as used in Chapter 632 as not being synonymous with the term "detention" within that same set of statutes. If those two terms are not synonymous with the Chapter itself, how can they be said to be synonymous between §571.090.1(6)? Returning to the language of that section it becomes obvious that the intention of the Legislature was to reference legal states wherein mental competency

and stability has been judicially determined after due process of law. The term "currently adjudged mentally incompetent" refers to the process resulting from a petition for guardianship under Chapter 475 wherein a probate Court has found mental incapacity. *See e.g.* §§475.010 et. seq.. The second phrase of that sentence refers to persons "committed" to mental facilities of this State, a status which can arise from more than one statutory source, but each of which results from some form of constitutionally sound process. As was observed previously, Chapters 552, 211 and 632 can result in "commitments" that would logically trigger §571.090.1(6); i.e. court judgments placing persons into the custody of specific authorities after due process.

The construction which the Sheriff followed, and the Trial Court approved, requires that the term "committed" be read into a statute and an order when it appears in neither, substitute it for a term ("detention") which the Legislature does not use synonymously and which, if used in that context, deprives a citizen of due process of law regarding important rights. This Court should remand this matter to the Circuit Court of Callaway County with direction to grant Nelson's petition for judicial review and instruct the Sheriff of Callaway County to issue the permit to acquire to Nelson as his petition pleads.

CONCLUSION

Wherefore, in view of the foregoing, Appellant David Nelson respectfully requests that this Court reverse the judgment of the Trial Court with instructions to enter judgment in favor of the Appellant and against Respondent.

Respectfully Submitted;

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CERTIFICATE OF SERVICE

The undersigned certifies that two true and correct copies of the foregoing document with an electronic copy of this document, in Word Format, on a CD-R compact disk, was hand delivered to the offices of Robert R. Sterner, Counsel for Respondent, at 10 E. 5th Street, Fulton, Missouri, 65251, on this 12th day of January, 2005.

_____

CERTIFICATION OF CONFORMANCE WITH APPELLATE COURT RULES

The undersigned certifies that the foregoing document complies with the requirements of Rule 84.06(b) and further states that this document contains _____ words and complies with the requirements of Rule 55.03. Further, the undersigned certifies that accompanying the original of this document the Appellant has submitted, on a virus free CD-R compact disk, an electronic copy of this document, in Word format.

_____

APPENDIX